Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DOREEN KEELER; and
PLANNED PARENTHOOD OF LOUISIANA, INC.,

Petitioners,

— v. —

RICHARD L. STALDER, Secretary,
Department of Public Safety and Corrections;
and JOHN KENNEDY, State Treasurer,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals err in expanding the scope of the Tax Injunction Act to divest the federal courts of jurisdiction in a challenge to a viewpoint discriminatory forum for speech where that challenge was brought by plaintiffs who were not seeking to avoid paying the fee required to enter into the forum, but rather were contesting the state's refusal to allow them to pay the fee and enter into the forum to express their own views?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No Petitioner is a publicly held corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), and is reproduced in the appendix to this petition at A-1-16. The order of the court of appeals denying rehearing *en banc* and the dissenting opinion joined by eight Circuit Judges is reported at *Henderson v. Stalder*, 434 F.3d 352 (5th Cir. 2005), and is reproduced in the appendix at A-75-83. The opinion of the district court denying a motion for a stay pending appeal is reported at *Henderson v. Stalder*, 281 F. Supp. 2d 866 (E.D. La. 2003), and is reproduced in the appendix at A-55-74. The opinion of the district court is reported at *Henderson v. Stalder*, 265 F. Supp. 2d 699 (E.D. La. 2003), and is reproduced in the appendix at A-17-54.

JURISDICTION

On December 21, 2005, the court of appeals denied rehearing *en banc* by an equally divided vote. This Court has jurisdiction under 28 U.S.C. § 1254 to review the judgment of the court of appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes involved in this case are set forth in the appendix at A-84-194:

U.S. Const. amend I (A-84).

U.S. Const. amend. XIV (A-84).

28 U.S.C. § 1341 ("Tax Injunction Act") (A-85).

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47:463.36-463.37, 47:463.39-463.41, 47:463.43-463.54, 47:463.56-463.64, 47:463.66-463.110 (A-86-181).[1]

STATEMENT OF THE CASE

I. The Viewpoint-Discriminatory Forum.

This case involves the enactment of a series of statutes by which "Louisiana has established numerous license plates that are available for motor vehicles which differ from the standard license plates required under Louisiana law, *see* La. Rev. Stat. § 47:505, in that they contain a message over and above identifying the car to which the license plate is attached." 265 F. Supp. 2d at 711 (A-34). Control over the content of these messages is within the unfettered discretion of the Louisiana Legislature. As the district court wrote:

> The State of Louisiana has created a forum — prestige license plates for privately owned vehicles — that is only open to those organizations the viewpoints of which the State approves. There is no neutrality in the scheme as it stands now; by defendants' own description of the scheme, an organization may only obtain a specialty plate if the Louisiana legislature condones the message so as to adopt it.

265 F. Supp. 2d at 718 (A-49). Moreover, "each prestige license plate issued in Louisiana . . . demonstrates some form of expression: membership in a group or organization; support for an institution; or endorsement of a cause, slogan or belief. Thus, only through legislative enactment of a statute can an organization, group of individuals, or other entity participate in this form of expression by obtaining and using such a license plate." *Id.* at 712 (A-37).

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[1] Several of the special license plate statutes enjoined by the district court have been subsequently repealed and are not included in the appendix.

In order to obtain a prestige license plate, a motorist must apply for the specific plate. In many cases, the motorist must pay a one-time or recurring fee to obtain such a plate, *see*, *e.g.*, A-90 (one-time fee for special Shriner license plate); A-89 (annual fee for special interest vehicle license plates). In some cases, no additional fee is required, *see, e.g.*, A-138 (special license plate for Jaycees). Some prestige plates require the motorist to be a member of an organization related to the plate itself, *see, e.g.*, A-91 (special Farhad Grotto license plate), and some are available to any member of the public willing to pay the requisite monetary charge, *see*, *e.g.*, A-118 ("Choose Life" license plate). In many instances, all of the money collected in payment for a particular plate is directed to an organization related to the message expressed on the plate. *See*, *e.g.*, A-99-100 (special United States Olympic Committee license plate with "donation" collected from motorists to be divided between certain organizations); A-149 (annual "royalty fee" for use of the logo of the Most Worshipful Prince Hall Grand Lodge F & AM Organization collected from motorists and forwarded to that organization).

Included among the license plates approved by the Legislature is a "Choose Life" license plate, La. Rev. Stat. § 47:463.61 (A-121-124), which embodies a slogan of political movement opposed to legal abortion. The statute establishing the "Choose Life" license plate also establishes a fund into which fees collected from motorists who want a "Choose Life" license plate are deposited, and from which grants will be made to non-profit organizations assisting pregnant women who intend to give birth and then give up the child for adoption. Such organizations cannot be "involved in, or associated with counseling for, or referrals to, abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising." La. Rev. Stat. § 47:463.61(F)(2) (A-123-124). The statute also delegates significant authority over the grant-making portion of the

statute to a Choose Life advisory council, to be comprised of sectarian organizations and their designees. La. Rev. Stat. § 47:463.61(E)(1) (A-122).

In contrast, the Legislature has not approved a pro-choice license plate, or indeed any license plate containing other views about abortion. Accordingly, the court of appeals described this case as "concern[ing] whether Louisiana's prestige license plate program facially discriminates against pro-choice views in contravention of the First Amendment." 407 F.3d at 352 (A-1).

II. History of the Proceedings.

This case was originally filed as a challenge to the "Choose Life" license plate statute only, and sought an injunction against implementation of that statute in order to restore viewpoint neutrality in the prestige license plate program. Plaintiffs challenged the statute on two grounds. First, plaintiffs alleged that permitting motorists to express their opposition to abortion but not permitting them to express their support for the right to choose abortion violated the viewpoint neutrality principle of the First Amendment. Second, Plaintiffs alleged that the statute's creation of a "Choose Life" advisory council, comprised of certain specific private organizations that are avowedly sectarian, and which has a significant role in implementing the administration of the "Choose Life" statute, violates the Establishment Clause. The district court granted a preliminary injunction, finding that Plaintiffs had demonstrated a likelihood of success on the first claim only. *See generally Henderson v. Stalder*, 112 F. Supp. 2d 589 (E.D. La. 2000) (granting preliminary injunction).

Respondents ("the State") filed an interlocutory appeal.[2] On appeal, the court of appeals, by a 2-1 vote, held that Plaintiffs lacked standing to challenge the "Choose Life" license plate statute and directed dismissal of the case.[3] *Henderson v. Stalder*, 287 F.3d 374, 382 (5th Cir. 2002). As is relevant here, the court of appeals held that Plaintiffs lacked standing to bring a viewpoint discrimination claim because an injunction against issuance of the "Choose Life" license plate would not redress the viewpoint discrimination of which Plaintiffs complained. Circuit Judge Jones concurred in a separate opinion, responding to the dissenting judge by noting that Plaintiffs might have standing if they challenged "the broad scheme for specialty plates." 287 F.3d at 386 (Jones, J., concurring). Circuit Judge Davis dissented, opining that the district court's injunction would redress the viewpoint discrimination by re-establishing a level playing field among competing viewpoints. *Id.* at 390 (Davis, J., dissenting) ("A person or group excluded from benefits conveyed via an underinclusive statute has standing to challenge the statute on constitutional grounds. This is so

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[2] The opinion of the court of appeals erroneously states that the district court "certified the case for interlocutory appellate review." 407 F.3d at 352 (A-2). In fact, the interlocutory appeal was taken under 28 U.S.C. § 1292(a)(1) (appeals of injunctive orders), not under § 1292(b) (certification where district court finds "a controlling question of law as to which there is substantial ground for difference of opinion"). Far from finding such "a controlling question of law as to which there is substantial ground for difference of opinion," the district court rejected the State's request for a stay of the injunction pending appeal. *Henderson v. Stalder*, No. 00-2237, 2000 WL 1875987 (E.D. La. Dec. 22, 2000) (denying stay).

[3] In addition to addressing the standing of the Plaintiffs named in the notice of appeal to raise viewpoint discrimination and Establishment Clause claims, the court of appeals also rejected the standing of a plaintiff added to the complaint after the State's notice of appeal was filed to raise a First Amendment claim against the restriction on the portion of the "Choose Life" statute establishing grants to non-profit organizations.

even if the effect of striking down the statute is to deny the benefit to the intended group and not extend it to the plaintiffs.").

Several months after the district court dismissed the case in compliance with the mandate of the court of appeals, and after the court of appeals denied rehearing and rehearing *en banc*, the court of appeals *sua sponte* modified its mandate as follows:

> The petition for rehearing is DENIED. The case is remanded to the district court with instructions to dismiss the case for lack of standing unless the plaintiff Keeler amends her petition within a reasonable time to challenge the state's overall policy and practice of issuing specialty license plates.

407 F.3d at 353 (quoting unpublished order) (A-2). In accordance with this revised mandate, Plaintiffs amended the complaint to challenge the state's "overall policy and practice of issuing specialty license plates."

The district court granted Plaintiffs' motion for summary judgment on their claim that Louisiana's special license plate scheme violates the First Amendment's guarantee of freedom of speech because it is a forum for speech that discriminates based on viewpoint. 265 F. Supp. 2d at 719 (A-51). The district court rejected the eleventh-hour argument that it lacked jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), because charges for special license plates are "taxes," reasoning that "Citizens do not impose taxes on themselves and this late [argument] borders on the absurd." 265 F. Supp. 2d at 720 n.12 (A-52). The district court expanded upon its reasoning in denying the state's motion for a stay pending appeal:

> [The court's injunction] has stopped the collection of fees which a person voluntarily agrees to pay for